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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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GEORGE W. RILEY and GOLDIE I. RILEY,
Petitioners,

vs.

No. 1601

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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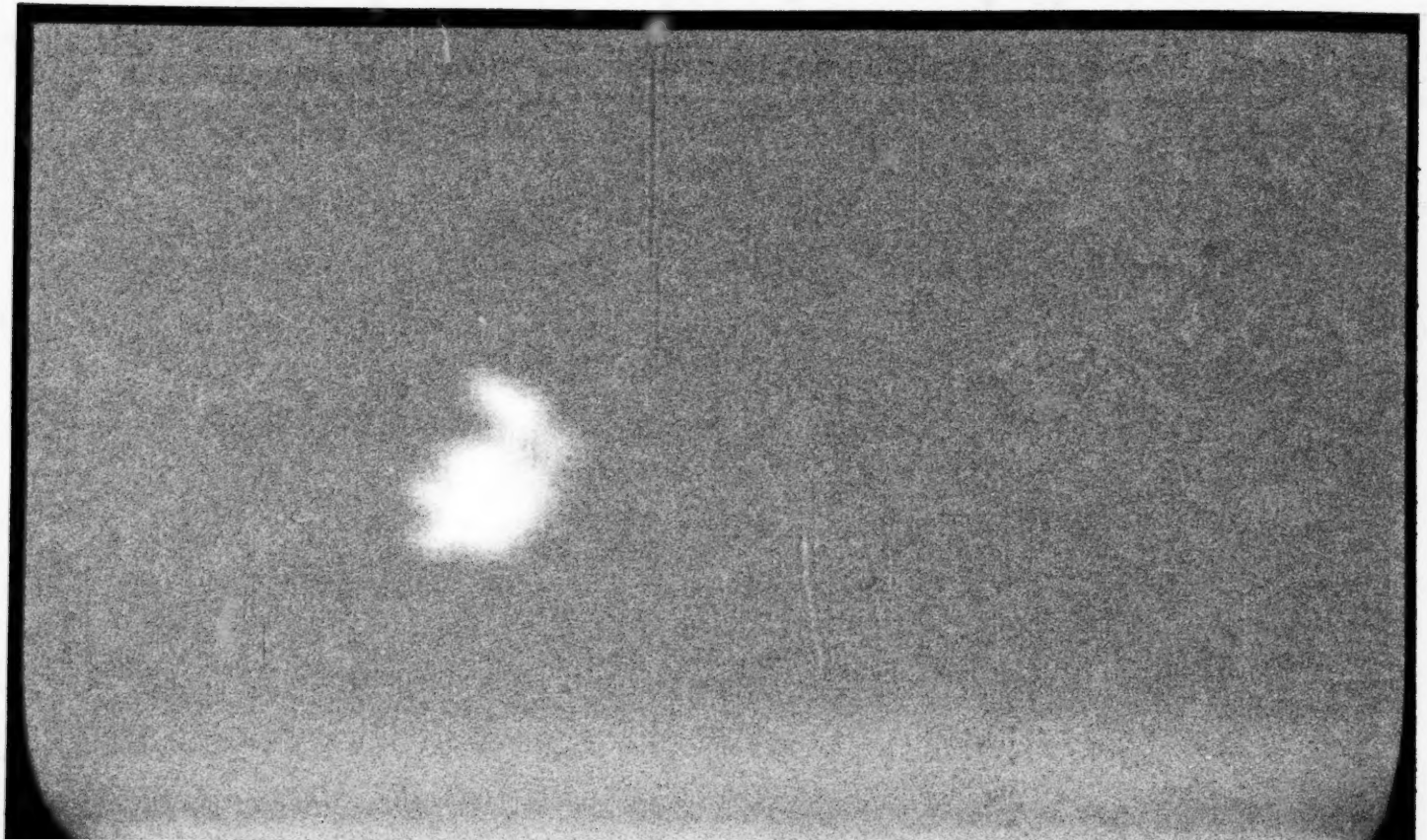

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT:	
I. Petition for writ of certiorari not filed in time	4
II. The matter does not merit review	5
III. Decision of Court of Appeals entirely proper	6
1. (I) The motion	6
2. (II) Decision does not reverse long established Michigan law	9
3. (III) Defendant had no right to set aside the default judgment	11
4, 5 & 6. (IV., V. & VI.) Exclusion Clause valid and enforceable	13
CONCLUSION	14
RELIEF	14

TABLE OF AUTHORITIES

	Page
Allstate Insurance Co. v. Charneski, 114 N.W. (2) (Wis) 489	12
Bass v. Aetna Casualty & Surety Co., 199 So (2) (C.A. Fla) 790	11
Bradford Electric Light Co., Inc. v. Clapper, N.H. 52 S. Ct R. 118, 284 U.S. 221, 75 L. Ed. 254	5
Cotton States Mutual Ins. Co. v. Torrance, 137 S.E. (2) (Ga) 551, aff. 140 S.E. (2) (S.C. Ga) 840	10
Felice v. Weinman, 372 Mich. 278, 126 N.W. (2) 107	13
Fosness vc. Panagos, 376 Mich. 485, 138 N.W. (2) 380	13
Frager v. Pennsylvania General Ins. Co., 231 Atl. (2) (Conn) 531	10
Harrison v. Ford Motor Co., 370 Mich. 683, 122 N.W. (2) 680	13
Hyde v. Shine, 25 S. Ct. 760, 199 U.S. 62, 50 L. Ed. 1101	5
Laird v. Nationwide Ins. Co., 134 S.E. (2) (S. Car) 206	11
M.F.A. Mutual Insurance Co. v. Bradshaw, 431 S.W. (2d) (Ark) 252	11
Naparstek v. Citizens Mutual Ins. Co., 19 Mich. App. 53, 172 N.W. (2) 205	11
Norton v. Allstate Insurance Co., 226 Fed. Supp. (E.D. Mich) 373	10
Oren v. General Accident Fire & Life Assur. Corp., 175 So. (2) (D.A. Fla) 581	10
Travelers Indemnity Co. v. Kowalski, 43 Cal. Rep. (D.A. Cal) 843	11
VanHorn v. State Farm Mutual Auto. Insurance Co., 283 F.S. (E.D. Mich), aff. 391 Fed 2d (6 C.A.) 910	10

TABLE OF AUTHORITIES (CONT'D)

	Page
Couch on Insurance (2), Sec. 45:619	12
Cyclop. of Federal Proc., Sec. 60.104	9
Rule 10(b), Federal Rules of Appellate Procedure	8
Rule 11 (b), Federal Rules of Appellate Procedure	8
Rule 11 (c) Federal Rules of Appellate Procedure	7
Rule 11 (d), Federal Rules of Appellate Procedure	7
Rule 12(a), Federal Rules of Appellate Proctdure	7
Rule 30 (b), Federal Rules of Appellate Procedure	8
Rule 520.1 Michigan General Court Rules	13
Sec. 24.13030 Michigan Statutes Annotated	13
Rule 23, Rules of the Supreme Court of the United States	5
Rule 34, Rules of the Supreme Court of the United States	5
Title 28, U.S.C.A., Section 2101(c)	1, 4
Title 28, U.S.C.A., Section 1254, footnote 43	5

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

In addition to the questions set forth in the plaintiffs' petition for certiorari, we submit the following questions presented:

I. Whether the petition should be considered when the petitioner has not filed his petition within the proper time, namely within ninety (90) days from the date of entry of the judgment on January 28, 1970, as required by Title 28, U.S.C.A., Section 2101(c).

II. Whether there were any special and important reasons for granting the petition.

STATEMENT OF THE CASE

The excellent opinion of the Court of Appeals sets forth the facts and covers each of the issues of law.

In addition to the arbitration provision quoted in the footnote of the opinion, there was the exclusion clause Insuring Agreement III which relates to the uninsured motorist coverage provision of the policy. The exclusion provision relating to uninsured motorist coverage provides:

> "*Insuring Agreement III does not apply:*
>
> "(a) to bodily injury to an insured, or care or loss of services recoverable by an insured, with respect to which such insured, his legal representative or any person entitled to payment under this coverage *shall, without written consent of the company, make any settlement with or prosecute to judgment any action against any person or organization who may be legally liable therefor;* . . ." (our italics)

The coverage provision of the defendant's policy agreed to pay to its insured, the plaintiffs, the sums the insured were legally entitled to recover from the operator or owner of an uninsured automobile, namely the Williams. And the insuring agreement then concluded:

> ". . . provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration."

Paragraph 15 reads in part:

> "If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount payable

hereunder, then each party shall, upon written demand of either select a competent and disinterested arbitrator."

The provision then provides for the selection of arbitrators and the place of holding the arbitration hearing.

The plaintiffs' complaint in the District Court requested that the Court adjudge the arbitration clause unenforceable, or in the alternative that defendant has waived the clause, and that the exclusion clause under Agreement III (a) requiring written consent of the defendant before plaintiffs might prosecute to judgment against the uninsured motorist be declared null and void as against public policy, that the Court declare the default judgment obtained in the Circuit Court of Mecosta County, Michigan against the uninsured motorist binding as against the defendant under said uninsured motorist clause, both as to liability and amount, and that judgment be entered for the plaintiffs against the defendant in the sum of Twenty Thousand ($20,000.00) Dollars plus interest, and any punitive damages and costs (7a) — (Figures followed by little "a" refer to appendix in Court of Appeals).

The answer of the defendant set forth and alleged the arbitration agreement was not void as against public policy, and further that the exclusion clause was binding and enforceable and was not null and void as against public policy (22a-23a).

The defendant insurance company also moved for summary judgment in the instant action on the basis of failure to arbitrate and failure to secure written consent to the judgment in the Circuit Court of Mecosta County, Michigan, which barred bringing of the instant suit. For the same reasons, defendant also moved for a directed verdict of no cause of action at the conclusion of the plaintiffs' case. The Trial Court by written opinion denied this motion (84a-90a).

At the trial, the Trial Court struck or took out the exclusion clause from the case and refused to consider it (44a, 45a-46a).

The judgment was entered in the District Court on October 23, 1968 (83a). Notice of appeal to the United States

Court of Appeals was filed on October 29, 1968 (2a). Within forty (40) days thereof, namely on December 6, 1968, an order on written ex parte petition or motion was entered by the District Court extending the time for filing the record and docketing the appeal in the Court of Appeals for a period of ninety (90) days from October 29, 1968.

On January 7, 1969, defendant forwarded a copy of the order to plaintiffs' attorney. On January 8, 1969, the District Court filed its written opinion in the case (84a).

On January 27, 1969, the record, including the entire transcript of testimony, was filed and docketed in the Court of Appeals. Within ten (10) days, in fact one day later, on January 28, 1969, the defendant-appellant forwarded to appellees' counsel a designation of the contents of the appendix and statement of issues involved. On or about January 31, 1969, plaintiffs' attorney moved to dismiss the appeal. The matter was fully briefed by both parties. The Court of Appeals then advised that the matter was passed to hearing on oral argument.

At the beginning of the oral argument in the Court of Appeals, Chief Judge Weick advised the defendant's counsel that it would not be necessary to argue the motion to dismiss.

The instant petition for certiorari was not docketed in this Court until May 25, 1970. No order granting an extension was entered.

ARGUMENT

I. Petition for writ of certiorari not filed in time.

Title 28, U.S.C.A., Section 2101(c) provides:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Plaintiffs' attorney presented a motion for extension of time after the 90 day period had expired and the motion was refused by the Clerk of the Supreme Court.

Rule 34 of the Rules of the Supreme Court of the United States provides in part:

> • • •
>
> 2. • • • "Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstance if filed during the last ten days of such period."

In *Bradford Electric Light Co., Inc. v. Clapper*, N.H. 52 Sup. Ct. Rep. 118, 284 U.S. 221, 76 L.Ed. 254, the Supreme Court held that application for certiorari must be made within the time limited.

Accordingly we respectfully submit that the writ should be denied.

II. The matter does not merit review.

Certiorari is a discretionary writ. *Hyde v. Shine*, 25 Sup. Ct. Rep. 760, 199 U.S. 62, 50 L.Ed. 1101.

In footnote 43 of Title 28 U.S.C.A. Sec. 1254, at page 66 it is said:

> "Jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or secure uniformity of decisions." (Many cases cited).

Rule 23 of the Rules of the Supreme Court of the United States provides in part:

> "1. The petition for writ of certiorari shall contain in the order here indicated —
>
> • • •

"(d) The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix."

The petitioners have not referred to this section in their petition, since no constitutional provision, treaty, statute, ordinance or regulation of the United States is involved.

The sole question involved is interpretation of Michigan law. There is no conflict between decisions of different Courts of Appeals, nor is the decision of the Court of Appeals in conflict with any decision of this Court.

Even had the petition been filed within the proper time, we submit the matter does not merit review by certiorai.

III. Decision of Court of Appeals entirely proper.

1. (I) The motion.

Petitioners claim error because their motion to dismiss the defendant's appeal was not specifically referred to in the written opinion of the Court of Appeals.

The matter was fully briefed before the Court of Appeals. That Court was obviously familiar with the motion and had considered it for at the oral argument the Court advised the defendant's counsel that it would not be necessary to orally argue the motion.

It is apparently plaintiffs' present contention that where an extension of time has been granted beyond the original 40 day period within which to docket the case in the Court of Appeals, that the appellant shall nevertheless have the appeal docketed and file a "partial record in the Court of Appeals" within the 40 days. We submit the contention is wholly without merit.

Reference to Rule 11 of the Federal Rules of Appellate Procedure (a) discloses that the record shall be transmitted within 40 days after filing the notice of appeal "unless the time is shortened or extended by an order entered

under subdivision (d) of this rule." Subdivision (d) provides that an order may be entered upon request extending the time for transmitting the record, not exceeding 90 days from the date of filing of the first notice of appeal. Accordingly where an extension order has been entered for 90 days, we submit it is clear that the record need only be transmitted by the Clerk within the extended 90 day period, and not within the original 40 day period as claimed by the petitioner.

And Rule 12(a) of the Federal Rules of Appellate Procedure provides for the docketing of the appeal "within the time allowed or fixed for transmission of the record."

And Rule 11(c) of the Federal Rules of Appellate Procedure to which petitioner refers states:

> "Temporary Retention of Record in District Court for Use in Preparing Appellate Papers. Notwithstanding the provisions of subdivisions (a) and (b) of this rule, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of Rule 12(a) and by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record."

There was no temporary retention of the record in our case, and accordingly this provision is not applicable. By transmitting the record and docketing the case within 90 days, the Rule has been fulfilled.

The above provision we submit provides that a record may temporarily be held back in the District Court for use in preparing the brief but nevertheless the case shall be docketed and a partial record in the form of the docket entries, forwarded within the 90 day period.

We submit there is absolutely nothing to require the defendant to docket the case within 40 days and send up a partial record at that time as petitioner claims.

Petitioner claimed Rule 10(b) had not been complied with.

Rule 10(b) of the Federal Rules of Appellate Procedure provides in part:

> "Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record."
>
> • • •
>
> "Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal."

In our instant case, the "entire transcript" was filed and accordingly there was no need to designate the parts of the transcript which appellant intended to present, to include in the record. Defendant properly designated the appendix as provided in Rule 30(b) of the Federal Rules of Appellate Procedure.

Plaintiffs also objected to the ex parte request or motion for extension of time to docket the case. It is the duty of the Clerk of the District Court to transmit the record to the Court of Appeals. Rule 11(b) of the Federal Rules of Appellate Procedure. And Rule 11(b) provides for a "*request* for extension" of time for transmitting the record. It does not provide for a motion. This "request" is often made by the Clerk himself. This ex parte procedure has been normal, ordinary, well recognized procedure and has been accepted for many years.

Under the prior rule, Cyc. of Federal Procedure, Sec. 60.-104 it is said:

> "In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than ninety days from the date of filing the first notice of appeal."

The defendant's attorney set forth the reasons in his written request or motion why the extension of time should be given and the Trial Court in his discretion entered an order of extension. Plaintiff was not harmed in any manner. Defendant's brief was promptly filed by March 6, 1969. Plaintiffs' attorney himself asked for an extension of time to file his brief.

The plaintiffs' objections were technical and we submit without merit. In any event, the Court of Appeals has discretion in dismissing appeals. Plaintiffs have cited no authority, and we know of none requiring an appellate court to specifically discuss each and ever ground raised.

Plaintiffs' objection regarding the appeal procedure certainly does not in our opinion merit consideration by this Court.

2. (II) Decision does not reverse long established Michigan law.

On December 12, 1963, the plaintiffs were involved in an automobile accident with one Williams. On November 26, 1965 without the knowledge or consent of the defendant, the plaintiffs filed a suit in the Mecosta Circuit Court of Michigan against the Williams.

The plaintiffs had a perfect right, if they chose, to sue and attempt to recover from Williams. In the event Williams was uninsured and if they wished to hold defendant insurance company under their uninsured motorist pro-

vision, the plaintiffs first had to secure the consent from the insurance company to institute such suit. This was not done. They did not even notify the defendant for approximately two years that the suit had been instituted. By letter dated January 17, 1966 (Monday) plaintiffs' attorney wrote to the defendant's agent in Big Rapids, Michigan, advising that the defendant should have never settled the claim of the Williams against the plaintiffs. And the plaintiffs' attorney also stated he was going to take a default judgment that Thursday. That information meant nothing to the defendant, since no claim had ever been made against the defendant insurance company under the uninsured motorist provision. On January 20, 1966 and by letter dated February 4, 1966, after the default judgment had been taken, the plaintiffs made claim for the first time under the uninsured motorist provision.

And in our case the plaintiffs never offered or demanded to arbitrate nor did defendant refuse arbitration. Arbitration is called for under the uninsured motorist provision, when the insured and the insurer cannot agree on liability or fault as between the insured and the third party, or the amount of the damages. *Frager v. Pennsylvania General Insurance Co.*, 231 Atl. 2d (Conn) (1967) 531, 533.

Thus denying liability or fault of the third party for the accident is entirely consistent with the demand for arbitration under the uninsured motorist provision of the policy. See *VanHorn v. State Farm Mutual Auto. Insurance Co.*, 283 F.S. (E.D. Mich) aff. 391 Fed. 2d (6 C.A.) 1968, 910; *Norton v. Allstate Insurance Co.*, 226 Fed. Supp. (E.D. Mich) 373.

For every statement of law in the opinion of the Court of Appeals there is law to substantiate that statement.

At page 28 of the plaintiffs' petition, the opinion of the Court of Appeals properly cites authority for the proposition that Michigan favors arbitration and that it is not contrary to public policy.

Further that the exclusion clause is valid and binding. See *Oren v. General Accident Fire & Life Assurance Corp.*, 175 So. (2) (D.A. Fla.) (1965) 581; *Cotton States Mutual Insurance Co. v. Torrance*, 137 S.E. (2) (Ga) (1964) 551,

aff. in 140 S.E. (2) (Ga.) 840; *Bass v. Aetna Casualty & Surety Co.*, 199 So. (2) (C.A. Fla) 790; *Travelers Indemnity Co. v. Kawalski*, 43 Cal. Rep. (D.A. Cal) (1965) 843. See also *M.F.A. Mutual Insurance Co. v. Bradshaw*, 431 S.W. 2d (Ark) (1968) 252 for a full discussion of the exclusion clause.

And in footnote 3 of the opinion of the Court of Appeals, (p. 30 petition for certiorari) the case of *Naparstek v. Citizens Mutual Ins. Co.*, 19 Mich App. 53, 172 N.W. 2d 205 is cited. In that case the exclusion clause was held applicable.

Nor was there any claim nor could there be any claim that the insurance company unreasonably or arbitrarily withheld its written consent to the suit. It was never asked to give its consent.

The opinion of the Court of Appeals is entirely in accord with Michigan law. The exclusion clause alone bars recovery in this case and should alone speedily dispose of the case.

3. (III) Defendant had no right to set aside the default judgment.

The uninsured motorist provision does *not* afford coverage to the uninsured motorist; it affords the insured additional protection. In *Laird v. Nationwide Insurance Co.*, 134 S.E. 2d (S.C.) 206 at pp 208 and 209 the Court said:

> "It is not the purpose of the uninsured motorist law to provide coverage for the uninsured vehicle but its object is to afford the insured additional protection in the event of an accident. Horne v. Superior Life Ins. Co., 203 Va. 282, 123 S.E. 2d 401.
>
> • • • •
>
> "Recovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist. Such an action is one ex delicto and the only issues to be determined therein are the liability and the amount of damage."

And in *Allstate Insurance Co. v. Charneski*, 114 N.W. (2) (Wis) 1962, 489 at page 493 the Court said:

> "The purpose of such provision for agreement or arbitration is to protect the insurer offering uninsured motorist coverage from a determination made in a suit which is either uncontested or inadequately contested by the other motorist. The determination that the other driver is uninsured is of basic importance to the liability of the insurance company providing uninsured motorist coverage."

See also Couch on Insurance (2) (1964) Sec. 45:619.

While plaintiffs' attorney apparently recognizes that the defendant did not have sufficient time to intervene prior to judgment in the Circuit Court, he claims the defendant could have intervened and appealed following the default judgment. The default judgment was taken January 20, 1966; by letter dated February 4, 1966 addressed to an agent of the defendant in Big Rapids, the plaintiffs' attorney enclosed copy of the default judgment and made claim for the first time under the uninsured motorist provision. Under Michigan law, a person has 20 days within which to appeal from a judgment. This would have given the defendant about five days within which to attempt to intervene and appeal.

Moreover the Court of Appeals properly said:

> "As we have previously pointed out, the company had no right to represent Williams in the Circuit Court and had no right to move to set aside the default judgment against him. We also question its right to intervene on its own behalf.
>
> "Rileys came within exclusion (a) of the policy by prosecuting to judgment the claim against Williams without the consent of State Farm. Because of the operation of exclusion (a), State Farm was completely relieved of any liability under coverage U of the policy. Therefore, regardless of the outcome of the action in the Mecosta County Circuit Court, State

Farm had no right to intervene since it was not a party in interest." (p. 31-32, Petition for Certiorari)

The Court of Appeals properly recognized that the policy does not afford coverage to the uninsured motorist. The defendant insurance company does not represent him. If the defendant insurance company were to intervene in the case between the insured and the third party, then insurance would be brought into the case to the detriment of their own insured. The insurance company could not put itself on both sides of the fence. See *Harrison v. Ford Motor Co.*, 370 Mich. 683, 687; 24.13030 M.S.A., *Felice v. Weinman*, 372 Mich. 278, *Fosness v. Panagos*, 376 Mich. 485.

Assuming further that an insurance company can intervene itself in a case, we have the further point that the insurance company cannot set aside a default entered against the uninsured motorist. Rule 520.1 of the Michigan General Court Rules provides in part:

> "Once a default of any party has been duly filed or entered, *that* party shall not proceed with *his* case until *his* default has been set aside by the court in accordance with sub-rule 520.4." (our italics)

Plaintiffs' attorney has cited no authority that the Court of Appeals was in error in stating that the insurance company had no right to represent Williams and to set aside the default entered against *him*.

Furthermore the Court of Appeals was clearly correct in holding that the insurance company had no interest in that case and accordingly could not even intervene.

4, 5 & 6. (IV., V. & VI.) Exclusion clause valid and enforceable.

We have already discussed and pointed out that the exclusion clause is valid, binding and enforceable in Michigan. There exists no confusion on this point.

As previously pointed out, the exclusion clause bars recovery in the instant case regardless of any other point.

CONCLUSION

The petition for certiorari was not timely filed. There is no substantial issue under State law; there is no Federal issue involved. The opinion of the Court of Appeals is an excellent well reasoned opinion, and as stated above, for any one of several reasons, the plaintiffs are not entitled to recover against the defendant insurance company in the instant case.

RELIEF

Wherefore the defendant-respondent respectfully requests this Honorable Court to deny the petition for writ of certiorari.

All of which is respectfully submitted.

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